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No. 96-1487

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

HOSEP KRIKOR BAJAKAJIAN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Our petition challenges the court of appeals' holding that 18 U.S.C. 982(a)(1) is a per se violation of the Excessive Fines Clause insofar as it requires criminal forfeiture of currency that is not reported in violation of 31 U.S.C. 5316. Respondent first contends (Br. in Opp. 6-7) that the court of appeals did not so hold. Instead, he argues, the court confined its ruling to cases in which unreported money is lawfully possessed and intended for a lawful purpose. The court of appeals, however, did not limit its holding in the manner suggested by respondent. The court's statement of its holding is unequivocal:

> Forfeiture of currency is unconstitutional when the crime to which the forfeiture is tied is

> mere failure to report pursuant to 31 U.S.C. § 5316. In such situations, there simply is not an instrumentality relationship between the currency and the crime to satisfy the instrumentality prong of the Excessive Fines Clause.

Pet. App. 8a. Respondent does not identify any language in the court's opinion that qualifies its holding that a forfeiture under Section 982(a)(1) is per se unconstitutional as applied to Section 5316 offenses.

Judge Wallace, concurring in the judgment, had no difficulty perceiving the breadth of the majority's ruling. In explaining his disagreement with the majority, he stated that the court "strikes down a portion of 18 U.S.C. § 982(a)(1)," Pet. App. 10a, that "even if a district court finds that money was illegally acquired, the majority does not allow forfeiture," *id.* at 12a, and that "even if a defendant's failure to report is combined with another violation of United States law (and the other law does not independently allow forfeiture), the majority still would not allow forfeiture," *ibid.* Respondent thus errs in seeking to confine the scope of the court of appeals' ruling to particular applications of Section 982.*

2. Respondent next contends (Br. in Opp. 7-8) that the decision below does not conflict with the Second

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* Even if the court had limited its ruling in the manner suggested by respondent, it would not reduce the need for this Court's review. Congress enacted a statute that requires mandatory forfeiture of unreported funds, regardless of whether the funds were lawfully possessed or intended for a lawful purpose. The ruling proposed by respondent would nullify that Act of Congress on constitutional grounds and replace it with one that required the government to establish that the funds were either unlawfully possessed or intended for an unlawful purpose.

Circuit's decision in *United States* v. *United States Currency in the Amount of $145,139*, 18 F.3d 73, cert. denied, 513 U.S. 815 (1994), because the Second Circuit focused on the double jeopardy issue in that case, and because its holding that unreported currency is an instrumentality of a Section 5316 offense appears in the double jeopardy, rather than the excessive fine, part of its opinion. The existence of a conflict in the circuits, however, does not depend on the focus or structure of an opinion. The relevant inquiry is whether one court's *holding* conflicts with that of another. Here, the Ninth Circuit has held that the forfeiture of unreported currency is per se an excessive fine, Pet. App. 8a-9a, while the Second Circuit has held that it is not, *United States Currency in the Amount of $145,139*, 18 F.3d. at 76. Those holdings squarely conflict.

Nor does it matter that the Second Circuit did not specifically discuss the application of its ruling to cases in which the currency was legitimately possessed and intended for a legitimate purpose (Br. in Opp. 8). As already discussed, the Ninth Circuit did not rely on that factor in its analysis; its holding applies to all unreported currency. At the same time, the Second Circuit did not confine its ruling to cases in which the currency is unlawfully possessed or intended for an unlawful use; its ruling also applies to all unreported currency. 18 F.3d at 76. Thus, in the Ninth Circuit, the government may not obtain the forfeiture of any unreported currency, while in the Second Circuit, the government may obtain the forfeiture of the entire sum. That conflict in the circuits warrants resolution by this Court.

3. Respondent also contends (Br. in Opp. 9-10) that the decision below does not conflict with *One Lot*

Emerald Cut Stones v. *United States*, 409 U.S. 232 (1972) (per curiam), because that case resolved a double jeopardy claim, not an excessive fine claim. But as we explain in our petition (Pet. 13), *Austin* v. *United States*, 509 U.S. 602, 621, 622 n.14 (1993), makes clear that remedial forfeitures of the kind approved in *One Lot Emerald Cut Stones* do not constitute excessive fines. *One Lot Emerald Cut Stones* is therefore relevant in resolving an excessive fine claim as well as a double jeopardy claim.

Respondent contends (Br. in Opp. 10) that *One Lot Emerald Cut Stones* is distinguishable because the gems seized in that case were contraband, while undeclared currency is not. But this Court did not characterize the gems seized in *One Lot Emerald Cut Stones* as contraband. And as we explain in our petition (Pet. 13-15), the gems seized in *One Lot Emerald Cut Stones* are analogous to undeclared currency in every relevant sense: Both are generally lawful to possess; both become subject to forfeiture when an attempt is made to smuggle them into or out of the country; both are the central instrumentality of that offense; and the forfeiture of both is fully justified as a remedial measure. Thus, just as the forfeiture of smuggled gems is not an excessive fine, so the forfeiture of undeclared currency is not an excessive fine.

4. Finally, petitioner contends (Br. in Opp. 10) that review is unwarranted, because (he asserts) our petition requests the Court to determine whether, on the facts of this case, the forfeiture is excessive. Our petition, however, does not seek review of a factbound excessiveness question. Rather, the petition seeks review of the court of appeals' legal analysis. In particular, we argue, the court committed two fundamental legal errors: First, the court of appeals erred in holding that undeclared currency is not an instrumentality of a Section 5316 offense (Pet. 12-15); and second, it erred in holding that criminal forfeiture of undeclared currency is per se excessive unless it can be characterized as an instrumentality of the offense (Pet. 15-16). Those legal errors led the court of appeals to conclude not only that the forfeiture in this case was constitutionally excessive, but also that the forfeiture of even one dollar of undeclared currency would be constitutionally excessive. Pet. App. 9a.

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For the foregoing reasons, and for the reasons set forth in our petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

MAY 1997